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No. 94-1885

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEW JERSEY,

Petitioner,

vs.

EDDIE SAEZ, ORLANDO NAVARRO and LUIS SAEZ,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT EDDIE SAEZ

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QUESTION PRESENTED

Whether this Court has jurisdiction to review a State Supreme Court decision appropriately based on its interpretation of state constitutional law.

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The respondent, Eddie Saez, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by petitioner, State of New Jersey.

OPINIONS BELOW

The Superior Court of New Jersey, Appellate Division, affirmed the trial court's denial of a Motion to Suppress Evidence seized without a search warrant. The court's opinion is reported at 268 N.J. Super. 250, 633 A.2d 551 (App. Div. 1993) and is reproduced in the Appendix to State of New Jersey's Petition for Certiorari (Pet. App. B, 6a-44a).

The Supreme Court of New Jersey reversed the decision of the Superior Court of New Jersey, Appellate Division and remanded for new trial. The court's opinion is reported at 139 N.J. 279, 653 A.2d 1130 (1995) and is reproduced in the Appendix to State of New Jersey's Petition for Certiorari (Pet. App. A, 1a-5a).

STATEMENT OF JURISDICTION

Petitioner invokes 28 U.S.C. § 1257(a) as the basis for review of the judgment of the New Jersey Supreme Court. Petitioner asserts that the New Jersey Supreme Court's opinion relies on that portion of the Superior Court of New Jersey, Appellate Division dissenting opinion that invokes only the Fourth Amendment and federal case law. Petitioner further asserts that the remainder of the same dissenting opinion speaks to possible exceptions to the warrant requirement as alternatives to the third-party intervention exception.

All of the above is a mischaracterization of the state court's opinion. There is no portion of the state court opinion which invokes the Fourth Amendment as the basis for the decision; to the contrary it specifically relies on Article I, paragraph 7 of the New Jersey Constitution. (Pet. App. B, 40a). The state court opinion also clearly states that federal cases are referred to merely for guidance. (Pet. App. B, 40a, 43a). The remainder of the decision discusses respondent's expectation of privacy.

Since the state court's decision is based squarely on its interpretation of New Jersey constitutional law, this Court lacks jurisdiction to review this matter.

STATEMENT OF THE CASE

The relevant facts of this case were elicited at the suppression hearing held before the state trial court. They are also set fort in the opinion of the Superior Court of New Jersey, Appellate Division (Pet. App. B, 11a-15a) and are as follows:

Investigators Cassidy and West, members of the Monmouth County Narcotics Strike Force, received information from a confidential citizen informant that alluded to narcotic activity in the basement of an adjoining residence. The investigators met with the informant, who at the time lived at 1111A Fifth Avenue in Asbury Park, New Jersey. The informant related that by looking through the wall separating her basement from 1111B Fifth Avenue, a separate residence, she could see Hispanic males doing what she believed to be cutting and packaging narcotics. Investigator Cassidy attempted to corroborate the information by taking a "ride by" check of the residence in question and running background checks of the residence occupants, in particular Eddie Saez.

Based upon the information received from the informant, the Monmouth County Prosecutor's Office decided to conduct a surveillance of 1111B Fifth Avenue by securing Investigator Cassidy in the basement of the informant's home. This would allow him to see through the basement wall which separated the two residences.

On May 17, 1990, Investigator Cassidy arrived at the informant's address at approximately 5:40 p.m. Cassidy immediately started his surveillance by peering through the small holes and cracks in the basement wall, at times utilizing pieces of a broken mirror. By doing so, he was able to observe narcotic activity involving a total of four Hispanic males. Investigator Cassidy kept in radio contact with Sergeant Brian Rubino and advised him of his observations.

After observing these activities for approximately forty-five minutes, Cassidy radioed to Sergeant Rubino that two of them were leaving the residence in a black Toyota. Officers stopped the motor vehicle occupied by Luis Saez and Orlando Navarro, who were placed under arrest at that time. Eddie Saez was not arrested on that evening, apparently so further observations of his conduct could be made from the basement of 1111A Fifth Avenue. (*See* Pet. App. B, 15a).

A search warrant was issued on May 18, 1990 but was not executed and was permitted to lapse. Instead, Investigator Cassidy continued to conduct observations in the same manner with negative results. A second search warrant was issued on May 29, 1990 and was executed on June 3, 1990 resulting in the seizure of narcotic paraphernalia. Eddie Saez was arrested at that time.

REASONS FOR DENYING THE WRIT

THE STATE SUPREME COURT CORRECTLY HELD THAT THE GOVERNMENT'S CONDUCT WAS AN UNLAWFUL SEARCH UNDER NEW JERSEY CONSTITUTIONAL LAW.

In an effort to invoke this Court's jurisdiction, the petitioners attempt to create a conflict between the state court's decision and prior decisions of this Court, where none exists. The state court was exercising its right to interpret portions of its own state constitution and to decide novel issues under the same. Petitioner is correct that the narrow issue presented here has not been decided by this Court under federal constitutional principles, yet petitioner attempts to create a conflict between state and federal law where none exists.

A. This Court Lacks Jurisdiction To Decide This Matter Since The State Court Based Its Decision Squarely On State Constitutional Law.

In an effort to obtain review here, the petitioners have mischaracterized the nature of the state court's decision, claiming that it is based on interpretations of federal constitutional law. To the contrary, the state court's decision rests squarely on New Jersey constitutional law.

Petitioners claim that the New Jersey Supreme Court's decision does not provide a plain statement of the existence of independent and adequate state grounds upon which the decision rests, but instead expressly relies on that portion of the dissenting opinion of the Superior Court of New Jersey Appellate Division, which invokes only the Fourth Amendment to the United States Constitution to invalidate the warrantless search. This is a complete mischaracterization of the state court's decision. To begin with, the New Jersey Supreme Court refers to and relies on the entire dissenting opinion of the Superior Court, Appellate Division, and not any specific portion. But more importantly, there is no portion of that dissenting opinion which invokes only the Fourth Amendment as a basis for the decision.

The dissenting opinion is clearly based on New Jersey constitutional law, as is evidenced by the following excerpt:

> Utilizing Fourth Amendment cases for guidance, *State v. Hempele*, 120 N.J. 182, 197-98 (1990), however, I am persuaded that the police surveillance in this case was an unlawful search under Article I, paragraph 7 of the New Jersey Constitution which in some circumstances affords greater protection against government searches than the Fourth

> Amendment. *Id.* at 195; *State v. Novembrino,* 105 N.J. 95, 145 (19878); *State v. Hunt,* 91 N.J. 338 (1982).

268 N.J. Super 250, 276 (App. Div. 1993). (Pet. App. B, 40a).

The fact that the state court's decision was based on New Jersey constitutional law could not be any clearer.

Although not as direct, further evidence that the state court's decision rests entirely on state law is found later in the same dissenting opinion:

> I reject the State's reliance on the plain view doctrine. *Texas v. Brown,* 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983); *State v. Bruzzese,* 94 N.J. 210 (1983), *cert. denied,* 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 695 (1984). Although the police had the right to be in the informant's basement, the issue is whether the police had the legal right, without a warrant, to breach, literally and figuratively, defendant's privacy wall. *But cf. State v. Smith,* 37 N.J. 481 (1962), *cert. denied,* 374 U.S. 835, 83 S. Ct. 1879, 10 L. Ed. 2d 1055 (1963), in which the Court held that the police did not violate the Fourth Amendment when officers peered into an apartment through either a keyhole or a crack in the door while they were standing in a common hallway. *Though valuable as guidance, Smith is not binding because the Court was applying the Federal Constitution, not the New Jersey Constitution.*

> Moreover, there is a different expectation of privacy regarding the security afforded by a door accessible from a common hallway and the security afforded by a basement wall.

(Emphasis added). 268 N.J. Super. at 278 (Pet. App. B, 43a). In light of the above two quotes from the dissenting opinion of the Superior Court of New Jersey, Appellate Division, it is clear that the state court's decision rests squarely on state constitutional law.

In *Arizona v. Evans*, 514 U.S. __, __, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), this Court reiterated the standards for determining its own jurisdiction previously stated in *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469 (1983) holding:

> When "a State Court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible State law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the State Court decided the case the way it did because it believed that federal law required it to do so."

Arizona v. Evans, 131 L. Ed. 2d at 41 *citing Michigan v. Long*, 463 U.S. 1032, 1040-1041.

In finding that there was jurisdiction, this Court held in *Evans* that "the Arizona Supreme Court's decision to suppress the evidence was based squarely upon its interpretation of federal law" and that it did not "offer a plain statement that its references to federal law were being used only for the purpose of guidance and did not themselves compel the result that it reached." *Evans, supra*, at 43 *citing Long, supra*, at 1041.

In this matter, the state court opinion provided a clear and plain statement that its decision was based on state constitutional law and that any references to federal cases were merely for the purpose of guidance. Any assertion by the petitioner to the contrary is meritless and should be rejected.

B. The State Court Correctly Held That The Police Officer's Action Was A Significant Expansion Of The Prior Private Search And Was Therefore An Unlawful Search Under Article I, Paragraph 7 Of The New Jersey Constitution.

Both the majority and dissenting opinions of the Superior Court of New Jersey, Appellate Division found that respondents had a legitimate and reasonable expectation of privacy. The majority opinion of the Appellate Division held that the warrantless search was nevertheless valid under the third party intervention doctrine created by *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). In reviewing this decision, the New Jersey Supreme Court held that the "extended and continuous police surveillance [w]as a significant expansion of the informant's prior observation of the activities conducted in the adjacent basement." (Pet. App. A, 2a-3a).

The crux of the decision is found in the language of the Superior Court of New Jersey, Appellate Division dissenting opinion:

> In the present case, the police were not invited to view specific, immutable objects that the tenant-informant had reduced to possession. The police were invited to participate in the surveillance of a basement and any activities which might occur in that basement during the police surveillance. Because no one could predict with certainty what the police would see, unlike the

> *Jacobsen* line of cases, each moment of surveillance was a new invasion of privacy. The basement activities to be seen from the tenant-informant's vantage point could have included licit as well as illicit behavior, activities of other members of the suspect's family and even private intimate behavior.

(Pet. App. B, 35a).

Petitioner asserts that the New Jersey state courts have misconstrued this Courts opinions in *United States v. Jacobsen,* 466 U.S. 109 (1984) and *Walter v. United States,* 447 U.S. 648 (1980), by limiting the third-party intervention doctrine to those instances where the private party, and subsequently the police, viewed only those items reduced to tangible, immutable contraband. Clearly this is not the case, as the New Jersey Supreme Court also stated, "we do not imply that the third party intervention exception applies only when the informant previously has reduced to possession the objects viewed by the law enforcement officials . . .". (Pet. App. A, 2a-3a).

Petitioner claims that the state courts misconstrued *Walter v. United States* by focusing on the character of the object of the search rather than the nature of the officer's conduct. To the contrary, as in *Walter,* the state courts focused exactly on the officer's conduct and the manner in which the officer significantly expanded the scope of the prior private search. Particularly in this matter it seems obvious that the officer intended to expand the search and perhaps view new items or activity as evidenced by the duration of his surveillance and the fact that he returned to conduct surveillance on subsequent occasions. The state courts appropriately applied the principles of the third-party intervention doctrine in finding that the private search was expanded by law enforcement and was unlawful under New Jersey constitutional law.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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